

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Even though claimant's chronic obstructive pulmonary disease may not have been permanently aggravated, the breathing of the fumes at work has at least temporarily exacerbated her lung problems and rendered her unable to return to work where she will breathe chemical fumes. Respondent has declined to accommodate claimant in this regard."

Respondent argued in its brief before the Appeals Board that neither the claimant's chronic obstructive pulmonary disease nor her chronic bronchitis was caused or aggravated on a permanent basis by her work. The respondent further argued that the reason claimant was on a medical leave of absence was due to permanent work restrictions from prior work-related injuries to her hands and back and not from her current pulmonary problems.

Claimant, on the other hand, argued that she contracted an occupational disease from exposure to fumes during her employment with the respondent which aggravated her preexisting pulmonary condition. Claimant further argued that temporary total disability weekly benefits should be awarded because the respondent is not reasonably accommodating the claimant and K.S.A. 44-510c(b)(2) requires temporary total disability benefits to be paid when an employer fails to accommodate the claimant as determined by her job duties.

Claimant had been treated for pulmonary problems with the diagnosis of chronic obstructive pulmonary disease and chronic bronchitis as far back as 1978. Claimant had smoked for some 50 years and was still smoking at the time of the preliminary hearing. Medical Records of claimant's family physician, Kendall M. Wright, M.D., were admitted into evidence with the first notation indicating that on July 25, 1989 he had treated claimant for chronic bronchitis prescribing antibiotics. Claimant alleged that in June of 1994, sometime around her birthday of June 14, 1994, she was exposed to chemical fumes from a cleaning compound she was using to clean urinals that caused her to have symptoms of shortness of breath, coughing, and spitting up green phlegm. After that incident, Dr. Wright's medical records indicated that claimant called on June 13, 1994, complaining of a cough and she was given a prescription for antibiotics. Claimant testified that she missed one day of work but returned the next day to her regular duties as a Custodian B for the respondent. The evidentiary record did not show that the claimant missed any other work until she was placed on a medical leave of absence by the respondent on May 23, 1995.

Dr. Wright's medical records indicated that after the June 1994 incident, he saw claimant for her chronic bronchitis condition on July 16, 1994 and August 22, 1994. On August 9, 1994, Dr. Wright prescribed an aerobid inhaler without seeing the claimant. Dr. Wright also had claimant undergo a pulmonary functional study which indicated a moderately obstructive ventilatory defect and significant airway reversibility following bronchodilators. The doctor's medical records indicated that prior to the alleged exposure incident of June 1994 he saw or prescribed medication for claimant's chronic bronchitis on nine separate dates from July 25, 1989 through March 22, 1994. In a letter to claimant's attorney dated April 11, 1996, Dr. Wright opined that claimant's pulmonary problems were permanent and claimant would have continuing problems with recurring bronchitis. Additionally, exposure to respiratory irritants, such as smoking and fumes, would greatly aggravate claimant's problems. However, Dr. Wright further opined that if claimant did wear a mask she would be able to perform work duties in an environment where she was exposed to fumes without aggravating her underlying pulmonary condition.

Respondent's insurance carrier referred claimant to Daniel C. Doornbos, M.D., of The Wichita Clinic in Wichita, Kansas, for a pulmonary consultation. Dr. Doornbos saw claimant on January 18, 1995. Dr. Doornbos opined that claimant did have irritation of her airways and

chronic obstruction pulmonary disease. Dr. Doornbos also opined that he could not completely exclude the possibility that claimant had some worsening due to the fume exposure at work. However, he felt that the majority of claimant's problems were actually due more to chronic bronchitis caused from cigarette smoking. Furthermore, Dr. Doornbos stated that claimant would be able to work at whatever job she desired if she was provided adequate protection by OSHA standards.

There is some confusion in the record as to whether the respondent placed the claimant on medical leave of absence for her respiratory problems or for the permanent severe work restrictions that had previously been placed upon her as a result of her work-related carpal tunnel syndrome and back injuries. As a result of those injuries, claimant had permanent work restrictions of no tight gripping, no lifting over 5 to 10 pounds, no bending and no working above shoulder level. Claimant testified that she thought the reason she was placed on medical leave of absence was because of her respiratory problem. However, respondent admitted into evidence an affidavit of Ken Mendenhall, personnel manager for the respondent, at the time claimant was placed on medical leave of absence, who stated claimant was placed on medical leave of absence because of her permanent restrictions from her prior injuries and not from her respiratory problems. In fact, claimant testified she was able to perform her work activities after the June 1994 incident without additional pulmonary problems because respondent provided her with a mask to wear when she was using cleaning compounds.

The Appeals Board finds from the totality of the evidentiary record that claimant did temporarily aggravate her preexisting pulmonary problems in an incident that occurred at work in June of 1994. However, the Appeals Board also finds that this temporary aggravation did not permanently worsen claimant's long history of chronic bronchitis. Claimant's testimony, coupled with the medical records admitted into evidence, prove that it is more probably true than not that claimant's continuing respiratory problems were originally caused from her smoking and continue to be causally connected to her smoking and not from claimant's work environment. Accordingly, the Appeals Board finds that claimant's present need for medical treatment is not the result of an occupational disease that arose out of and in the course of her employment with the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order For Compensation entered by Administrative Law Judge Floyd V. Palmer dated May 15, 1996, is reversed and preliminary hearing compensation benefits should be, and are hereby, denied the claimant.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director